

Feb 06, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SAFECO INSURANCE COMPANY
OF AMERICA, as subrogee for
Gerard and Velma Michaelsen,

Plaintiff,

v.

RHEEM MANUFACTURING
COMPANY, a Delaware corporation,
and DANNY ZAVALA, individually
and on behalf of his marital community

Defendants.

No. 4:18-cv-05167-SMJ

**ORDER GRANTING MOTION TO
REMAND**

Before the Court, without oral argument,¹ is Defendant Danny Zavala's Motion to Dismiss for Want of Subject Matter Jurisdiction or for Remand, ECF No. 26. Zavala moves to dismiss this case or to remand it to the state court from which it was removed. Zavala contends that because both he and Gerard and Velma Michaelsen, on whose behalf Plaintiff Safeco Insurance Company of America ("Safeco") brought suit as subrogee, are citizens of Washington State, there is not

¹ Although Zavala's motion is noted for hearing with oral argument, the Court considers oral argument unnecessary and therefore decides the motion without it. See LCivR 7(i)(3)(B)(iii).

1 complete diversity of citizenship and the Court lacks jurisdiction. Safeco and
2 Defendant Rheem Manufacturing Company (“Rheem”) oppose the motion,
3 contending the Michaelsens are nominal parties whose presence should not be
4 considered in assessing diversity. For the reasons that follow, the Court finds the
5 Michaelsens *are* real parties in interest to the litigation, and therefore remands for
6 lack of jurisdiction.

7 **BACKGROUND**

8 The Michaelsens owned a home in Prosser, Washington, and insured it
9 against loss through Safeco. ECF No. 9 at 1–2. In 2014, Zavala installed a furnace
10 manufactured by Rheem in the Michaelsens’ home. *Id.* at 2. On Christmas Eve
11 2017, the furnace allegedly malfunctioned, causing a fire which resulted in serious
12 damage to the home. *Id.* The Michaelsens filed a claim against their property
13 insurance policy and Safeco paid them the value of the damage to their home, minus
14 a \$2,500 deductible—approximately \$192,000. *Id.*

15 On September 5, 2018, Safeco, as subrogee of the Michaelsens, brought suit
16 against Rheem alleging defects in the design, manufacture, and installation of the
17 furnace at issue. *Id.* The suit was originally brought in the Benton County,
18 Washington Superior Court. *Id.* On October 16, 2018, Rheem removed the case,
19 invoking this Court’s diversity jurisdiction under 28 U.S.C. § 1332. ECF No. 1.
20 Safeco subsequently moved to amend the complaint to add Zavala as an additional

1 Defendant. ECF No. 7. The Court granted the motion, and on February 11, 2019,
2 Safeco filed a First Amended Complaint. ECF Nos. 8, 9.

3 Zavala now moves to dismiss this action, or in the alternative to remand to
4 the state court, asserting the Court lacks subject matter jurisdiction. ECF No. 26.
5 Zavala claims that under Washington law, the Michaelsens are parties in interest to
6 the litigation notwithstanding Safeco's status as subrogee of their claims. *Id.* at 4–
7 6. Zavala, who is a Washington resident, *see* ECF No. 37-1, contends that there is
8 therefore not complete diversity of citizenship, and the Court must dismiss or
9 remand. *Id.* at 6–8. Safeco and Rheem oppose the motion, arguing the Michaelsens
10 are not properly considered in the diversity calculus and, if the Court were to
11 disagree, that the appropriate remedy is remand, not dismissal. ECF Nos. 31, 32.

12 **LEGAL STANDARD**

13 The jurisdiction of the federal courts is limited. A defendant may generally
14 invoke that jurisdiction by removing from a state court any suit over which the
15 federal court would have had jurisdiction originally. 28 U.S.C. § 1441(a). There is
16 a “strong presumption” against removal jurisdiction, and the Defendant always
17 bears the burden of establishing jurisdiction exists. *Gaus v. Miles, Inc.*, 980
18 F.2d 564, 566 (9th Cir. 1992) (quoting *Nishimoto v. Federman–Bachrach &*
19 *Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir. 1990); *see also Moore-Thomas v. Alaska*
20 *Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009). Doubts as to the propriety of

1 removal are resolved in favor of remand. *Gaus*, 980 F.2d at 566 (citing *Libhart v.*
2 *Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979)).

3 Removal jurisdiction premised on diversity of citizenship, once obtained, is
4 not perpetual; the subsequent joinder of a non-diverse party strips the Court of
5 jurisdiction. *See Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 946 (9th Cir.
6 2004). Thus, when presented with a motion to join a party whose presence would
7 eliminate complete diversity, the Court has two options: “deny joinder, or permit
8 joinder and remand the action to the State court.” 28 U.S.C. § 1447(e).

9 In cases such as this, where an insurer sues in a representative capacity on
10 behalf of an insured to whom it has paid policy proceeds—that is, by virtue of a
11 contractual or equitable right of subrogation—the analysis begins with Federal Rule
12 of Civil Procedure 17(a), which provides that “[a]n action must be prosecuted in the
13 name of the real party in interest.” Because a federal court sitting in diversity applies
14 the substantive law of the state, identifying the real party in interest requires the
15 Court to determine which is the proper party to maintain the action under the
16 relevant state’s law. *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093–94 (9th
17 Cir. 2004) (citing *Am. Triticale, Inc. v. Nytco Servs., Inc.*, 664 F.2d 1136, 1141 (9th
18 Cir. 1981)).

19 Under Washington law, when an insurer brings suit as subrogee to its insured,
20

1 the insured remains the real party in interest.² *See Allstate Ins. Co.*, 358 F.3d
2 at 1091–92 (citing *Mahler v. Szucs*, 957 P.2d 632, 640, *order corrected on denial*
3 *of reconsideration*, 966 P.2d 305 (Wash. 1998), *implied overruling on other*
4 *grounds recognized in Matsyuk v. State Farm Fire & Cas. Co.*, 272 P.3d 802
5 (2012)); *McRory v. N. Ins. Co. of New York*, 980 P.2d 736, 739 (1999) (“The
6 insured, not the insurer, is the real party in interest.”)).

7 DISCUSSION

8 Few of the facts in this matter are uncertain. Zavala is a citizen of
9 Washington.³ ECF No. 9 at 2. The Michaelsens are citizens of Washington. ECF

10 _____
11 ² In contrast to suits brought by virtue of a right to subrogation, Washington law
12 expressly authorizes the contractual *assignee* of another’s claim to sue in its own
13 name. *See* Wash Rev. Code. § 4.08.080 (“Any assignee . . . may, by virtue of such
14 assignment, sue and maintain an action or actions in his or her name.”). As such,
15 when an insurer sues as *assignee* of its insured’s claim, rather than *subrogee* to that
16 claim, the citizenship of the claim’s assignor is irrelevant. *See Absher Const. Co. v.*
17 *N. Pac. Ins. Co.*, No. C10-5821JLR, 2012 WL 13707, at *5 (W.D. Wash. Jan. 3,
18 2012). However, there is no evidence in the record from which the Court could infer
19 that the Michaelsens assigned their claims against Rheem or Zavala to Safeco; to
the contrary, the fact that the Michaelsens stand to recover their \$2,500 deductible
militates against a finding that Safeco is their contractual assignee. Moreover,
Safeco repeatedly refers to its relationship with the Michaelsens as one arising out
of subrogation, not assignment, principles. *See* ECF No. 31 at 5 (“Safeco Is The
Real Party In Interest In This Property Subrogation Lawsuit”); *id.* (“Safeco has filed
a subrogation claim Against Rheem and Zavala”). Accordingly, the Court limits its
analysis to applicable principles of subrogation and does not consider Safeco’s
standing to bring suit as assignee of the Michaelsens’ claim, or whether the Court
could properly exercise jurisdiction over the matter had it done so.

20 ³ Safeco initially challenged Zavala’s United States citizenship, a prerequisite to
state citizenship necessary to defeat diversity jurisdiction. *See* ECF No. 31 at 4.

1 No. 9 at 2; *see also* ECF No. 31-2. Thus, if the Michaelsens are parties in interest
2 to the litigation, there is not complete diversity of citizenship between the parties,
3 and the Court lacks jurisdiction. *See* 28 U.S.C. § 1447(e); *Gaus*, 980 F.2d at 566.

4 Under Washington law, the Michaelsens are the real parties in interest in this
5 dispute. *McRory*, 980 P.2d at 739. To be sure, Safeco has a right to reimbursement
6 from the party liable for the damage to the Michaelsens home because Safeco, as
7 the Michaelsens' insurer, compensated them for that loss. But Safeco's right to such
8 reimbursement arises by virtue of its status as subrogee to the Michaelsens. And
9 under such circumstances, Washington law clearly provides that "[t]he insured, not
10 the insurer, is the real party in interest." *McRory*, 980 P.2d at 739.

11 The cases cited by Safeco and Rheem to escape this conclusion, neither of
12 which dealt with the issue of the real party in interest, are unavailing. *See* ECF
13 No. 31 at 10 (citing *Chen v. State Farm Mut. Auto. Ins. Co.*, 94 P.3d 326, 330
14 (Wash. Ct. App. 2004); (holding insured not entitled to pro rata attorney fees under
15 common fund doctrine in case where subrogee insurer recovered funds paid to
16

17 Contrary to Safeco's argument, a party need not *prove* facts of jurisdictional
18 significance unless those facts are disputed. At the pleading stage, allegations of
19 jurisdictional fact need not be proven unless challenged. *NewGen, LLC v. Safe Cig,*
20 *LLC*, 840 F.3d 606, 614 (9th Cir. 2016) (citing *DaimlerChrysler Corp. v. Cuno*, 547
U.S. 332, 342 n.3 (2006)). Thus, Zavala's failure to do so in moving to dismiss is
not fatal. And in response, Zavala submitted a copy of his United States birth
certificate. ECF No. 37-1. As such, for purposes of diversity jurisdiction, the Court
considers Zavala a citizen of Washington. *See id.*; *see also* ECF No. 27 at 1–2.

1 insured for property damage); *Meas v. State Farm Fire & Cas. Co.*, 123 P.3d 519,
2 523 (Wash. Ct. App. 2005) (holding subrogation right gave insurer right to pursue
3 tortfeasor for amount paid to insured by virtue of insured's property damage).
4 Accordingly, the Court finds no basis to depart from applying the rule of
5 Washington law that in the subrogation context "[t]he insured, not the insurer, is the
6 real party in interest." *McRory*, 980 P.2d at 739. Thus, considering the citizenship
7 of both Zavala and the Michaelsens, there is not complete diversity of citizenship,
8 and the Court lacks jurisdiction. *See Allstate Ins. Co.*, 358 F.3d at 1093–94; *see also*
9 *Travelers Indem. Co. v. Hoffman Constr. Co. of Washington*, No. 2:16-CV-00431-
10 SAB, 2018 WL 2470725, at *3 (E.D. Wash. June 1, 2018) (dismissing for lack of
11 subject matter jurisdiction where insurer sued Washington Defendant as subrogee
12 of Washington university).

13 The only remaining issue is the appropriate course of action based on that
14 conclusion. Zavala moves to dismiss the case for lack of jurisdiction or, in the
15 alternative, to remand the case to the state court. Safeco and Rheem contend that if
16 jurisdiction is lacking, the proper remedy is remand, not dismissal. The Court agrees
17 with Safeco and Rheem. 28 U.S.C. § 1447(e) envisions a scenario such as this one,
18 when joinder of a non-diverse party would eliminate complete diversity in a case
19 previously removed from the state court. That statute provides the Court two
20 options: "deny joinder[] or permit joinder and remand the action to the State court."

1 *Id.* Zavala cites no authority for the proposition that the Court may dismiss a matter
2 simply because the Court permits joinder of a non-diverse party. As such, this
3 matter is remanded to the Superior Court for the State of Washington, Benton
4 County.

5 **CONCLUSION**

6 Under Washington law, when an insurer sues on behalf of its insured by
7 virtue of a right of subrogation, the insured remains the real party in interest,
8 notwithstanding the fact that they may have little to gain by litigating or lack the
9 desire to participate. Here, the Michaelsens remain the real parties in interest, and
10 Safeco's role in the suit is that of subrogee. Safeco's decision to join Zavala—a
11 motion to which Rheem did not object—eliminated complete diversity and divested
12 the Court of jurisdiction. The motion is granted, and the matter is remanded to the
13 state court.

14 Accordingly, **IT IS HEREBY ORDERED:**


- 15 1. Defendant Danny Zavala's Motion to Dismiss for Want of Subject
16 Matter Jurisdiction or for Remand, **ECF No. 26**, is **GRANTED**.
- 17 2. This matter is **REMANDED** to the Benton County, Washington
18 Superior Court, case number 18-2-02240-03.
- 19 3. All parties shall bear their own costs and attorneys' fees.
- 20 4. All pending motions are **DENIED AS MOOT**.

1 5. All hearings and other deadlines are **STRICKEN**.

2 6. The Clerk's Office is directed to **CLOSE** this file.

3 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
4 provide copies to all counsel.

5 **DATED** this 6th day of February 2020.

6 
7 SALVADOR MENDOZA, JR.
 United States District Judge